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HEAN SANG SDN BHD v. KOMPLEKS YIK FOONG MANAGEMENT CORPORATION

HIGH COURT MALAYA, IPOH
LEE SWEE SENG J
[SUIT NO: 22NCVC-55-05-2014]
B 30 JANUARY 2015

CIVIL PROCEDURE: *Judgment – Consent judgment – Interpretation of – Whether words employed in judgment clear and unambiguous – Whether meaning of judgment clear to reasonable man – Whether resort may be had to*
C *contemporaneous documents to yield different meaning*

CIVIL PROCEDURE: *Res judicata – Issue estoppel – Same issue premised on same factual matrix heard and determined by earlier court – Doctrine of res judicata – Whether applicable*

D The plaintiff was the developer of a shopping complex and the owner of 75 shop lots in the complex. The defendant, the management corporation for the said building, sued the plaintiff for the arrears of maintenance charges in the Ipoh High Court ('the 2001 suit'). The claim was for the sum of RM2,480,932.93. The parties subsequently entered into a consent judgment
E in settlement of the defendant's claim in the 2001 suit. However, problems arose in interpreting the consent judgment. The plaintiff took the stand that the consent judgment was clear in that in full and final settlement of all arrears of maintenance charges sued for, the plaintiff would transfer 53 units of shop lots to the defendant and as a further consideration for the said settlement, shall continue to pay maintenance charges at an agreed rate of
F RM1.25 psf for the remaining 22 lots. According to the defendant, there was a rational basis for the plaintiff paying RM1.25 psf for the remaining 22 lots compared to others paying a mere RM1 psf. The extra RM0.25 psf was to pay for the balance RM1,080,719.97 after the value attached to the 53 lots (settlement lots) to be transferred to the defendant. The defendant said that
G the sum of RM5,149,719.97 being the arrears outstanding after minusing the sum of RM4,069,000 being the value of the 53 units agreed to be transferred to the defendant would give the balance of RM1,080,719.97 to be paid by the extra charge of RM0.25 psf until full and final settlement. The crunch came when the plaintiff wanted to sell their remaining units to a third party.
H As the plaintiff had been paying monthly the extra maintenance charges, the defendant calculated that from 1 September 2010 to 31 March 2014 there had been paid a sum of RM104,334.34, thus leaving a balance of RM976,385.63 ('the garnished sum'). Realising that there will be the balance purchase price to be paid by the third party to the plaintiff, the defendant,
I as the judgment creditor ('JC') in the 2001 suit, moved for a garnishee order

to show cause against the third party garnishee for the garnished sum. The plaintiff being named as the judgment debtor ('JD') applied to set aside the said garnishee order to show cause. Soon after being served with the garnishee order to show cause, the plaintiff filed the present proceedings seeking a declaration that it did not owe the defendant the sum of RM976,386.65. Meanwhile, the High Court hearing the garnishee application held that there was no outstanding judgment debts due and owing to the defendant from the plaintiff under the consent judgment.

Held (allowing plaintiff's claim with costs):

(1) The words employed in the consent judgment were clear and unambiguous. They were not difficult to understand. The consent judgment spelled out clearly what the plaintiff was required to do. The plaintiff had to transfer the settlement lots to the defendant in full settlement of the defendant's claim for maintenance charges and further the plaintiff was required to pay maintenance charges of RM1.25 psf on the lots owned by the plaintiff commencing from the date of the consent judgment. (para 16)

(2) Since the transfer by the plaintiff to the defendant was in full settlement of the defendant's claim, both the amount in arrears and the value of the settlement lots had to be understood to be sufficient consideration to amount to a full settlement of the defendant's claim. Otherwise, the figure for the amount outstanding would have been stated and the value of the settlement lots as might have been agreed by the parties. Both were conspicuously and consciously left out as the consent judgment was drafted by the solicitors from both sides; not by laymen. (para 17)

(3) Where a reasonable man reading the terms of the consent judgment has no doubt as to its meaning, resort must not be had to even contemporaneous documents which if referred to, would yield a different meaning. This is consistent too with the exclusion of extrinsic evidence rule as codified under ss. 91 and 92 of the Evidence Act 1950. There was no difficulty for a reasonable man in interpreting the terms of the consent judgment, to come to the conclusion that the amount claimed had been settled by a transfer from the plaintiff to the defendant of the settlement lots and the payment thereafter by the plaintiff of maintenance charges at the rate of RM1.25 psf for the remaining lots still with the plaintiff. (paras 23 & 29)

(4) This was a fit and proper case for the application of the doctrine of *res judicata*. Where the issue is the same premised on the same factual matrix that an earlier court has to ascertain and determine, another court would be barred by the doctrine of *res judicata* and in this case, issue

A estoppel, from reopening the same issue and re-litigating the same issue again. In both the garnishment proceeding in the 2001 suit and the declaration sought in this action, there was only a single issue to be decided: as to whether there was any sum due and owing by the plaintiff/JD to the defendant/JC. That determination straddled the
B same substratum of facts in both the garnishment proceeding and this writ action. The result had to be the same and more so when the earlier decision in the garnishment proceeding had been affirmed on appeal by the Court of Appeal. (paras 70, 71 & 74)

Case(s) referred to:

C *Asiapools (M) Sdn Bhd v. IJM Construction Sdn Bhd [2010] 2 CLJ 28 CA* ***(refd)***
Attorney General of Belize and Others v. Belize Telecom Ltd and Another [2009] 2 All ER 1127 PC ***(refd)***
Australian Broadcasting Commission v. Australasian Performing Rights Association Ltd (1973) 129 CLR 99 ***(refd)***
BCCI v. Ali [2001] UKHL 8, [2001] 2 WLR 735 ***(refd)***
D *CMC Perniagaan Sdn Bhd v. Shimizu Construction Co Ltd (Civil Suit D4-23-300-88) (Unreported)* ***(refd)***
Deutsche Genossenschaftsbank v. Burnhope [1995] 1 WLR 1580 ***(refd)***
Government of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER
E *98* ***(refd)***
Kompleks Yik Foong Management Corporation v. Hean-Sang Sdn Bhd; Myth Empire Properties Sdn Bhd [2014] 1 LNS 1575 HC ***(refd)***
Malaysia Discounts Bhd & Ors v. Pesaka Astana (M) Sdn Bhd & Ors [2008] 5 CLJ 130 CA ***(refd)***
F *MBf Holdings Berhad & Anor v. Dato' Loy Teik Ngan & Anor (and 7 Other Appeals) [2015] 1 AMCR 21 CA* ***(refd)***
Michael C Solle v. United Malayan Banking Corp Bhd [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***
Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***
G *Pacific Century Regional Development Ltd v. Canadian Imperial Investment Pte Ltd [2001] 2 SLR 443 CA* ***(refd)***
Pembinaan Perwira Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd [2011] 1 LNS 1769 CA ***(refd)***
Prenn v. Simmonds [1971] 1 WLR 1381 ***(refd)***
Re Butlin's Settlement Trust [1976] Ch 251 ***(refd)***
H *Roberto Building Material Pte Ltd v. Oversea-Chinese Banking Corporation [2003] 3 SLR (R) 217* ***(refd)***
Tan Swee Hoe Co Ltd v. Ali Hussain Bros [1979] 1 LNS 113 FC ***(refd)***
Tio Chee Hing v. Tractors Malaysia Bhd [1972] 1 LNS 157 FC ***(refd)***

Legislation referred to:

I Evidence Act 1950, ss. 91, 92

Other source(s) referred to:

Interpretation of Contracts by Catherine Mitchell, Routledge-Cavendish, 2007, p 33
The Interpretation of Contracts, Kim Lewison, London: Sweet & Maxwell 1989, pp 3 to 4
The Law of Contract, GH Treitel, 11th edn, 2003, London: Sweet and Maxwell, p 192

For the plaintiff - SY Lee; M/s Mohd Noor & SY Lee
For the defendant - Kerpal Singh; M/s Iszam Kamal & Hazlan

Reported by Amutha Suppayah

JUDGMENT

Lee Swee Seng J:

[1] The defendant here had obtained a consent judgment in an earlier suit against the plaintiff here. The plaintiff was the developer of a shopping complex and the owner of 75 shop lots in the complex. It had been in arrears of maintenance charges for the units owned by them. The defendant is the management corporation for the said building. It sued the plaintiff here for the arrears of maintenance charges in Ipoh High Court Civil Suit No. MT4-22-253-2001 ("the 2001 suit"). The claim was for the sum of RM2,480,932.93 and for interest and costs in the amended statement of claim. The 2001 suit was not heard until 2010. The parties before trial entered into a consent judgment in settlement of the defendant's claim in that suit.

Problem

[2] There is now the problem of interpreting the consent judgment recorded on 3 September 2010. The defendant was prepared to admit that it could have been more clearly worded. The plaintiff however took the stand that the consent judgment is clear in that in full and final settlement of all arrears of maintenance charges sued for, the plaintiff would transfer 53 units of shop lots to the defendant and as a further consideration for the said settlement, shall continue to pay maintenance charges at an agreed rate of RM1.25 per sq foot for the remaining 22 lots.

[3] According to the defendant there was a rational basis for the plaintiff paying RM1.25 psf for the remaining 22 lots compared to others paying a mere RM1 psf. The extra RM0.25 psf was to pay for the balance RM1,080,719.97 after the value attached to the 53 lots (settlement lots) to be transferred to the defendant. The defendant said that the sum of RM5,149,719.97 being the arrears outstanding after minusing the sum of RM4,069,000 being the value of the 53 units agreed to be transferred to the defendant would give the balance of RM1,080,719.97 to be paid by the extra charge of RM0.25 psf until full and final settlement.

[4] The crunch came when the plaintiff wanted to sell their remaining units to a third party. As the plaintiff had been paying monthly the extra maintenance charges, the defendant calculated that from 1 September 2010 to 31 March 2014 there had been paid a sum of RM104,334.34, thus leaving a balance of RM976,385.63 ("the garnished sum").

[5] Realising that there will be the balance purchase price to be paid by the third party to the plaintiff, the defendant here, as judgment creditor ("JC") there in the 2001 suit, moved for a garnishee order to show cause against the third party garnishee for the garnished sum. The plaintiff being named as the judgment debtor ("JD") there applied to set aside the said garnishee order to show cause.

Prayer

[6] Soon after being served with the garnishee order to show cause, the plaintiff filed this writ action against the defendant.

[7] The plaintiff prayed for a declaration that in view of the consent judgment of 3 September 2010, the plaintiff does not owe the defendant the sum of RM976,386.65 or any other sums as at 30 April 2014 and thereafter.

[8] The plaintiff also claimed for interest on the said sum of RM976,386.65 with effect from 6 May 2014 up to the date of receipt by the plaintiff of this sum at the rate of 8% per annum.

[9] Meanwhile the garnishee order to show cause applied for by the defendant as the JC had been set aside by the High Court hearing the matter. It succeeded in so doing as the High Court there had held that there is no outstanding judgment debts due and owing to the defendant from the plaintiff under the consent judgment. The defendant here as the JC there had also appealed to the Court of Appeal and its appeal had been dismissed.

[10] Both parties had agreed that the documents in the various bundles filed are all in part B and shall be admitted as exhibits and evidence subject only to the weight that the court may place upon it after it has heard the evidence of the parties.

Principles

Whether The Terms Of The Consent Judgment Are Clear And Unambiguous And That The Plaintiff Here Does Not Owe The Defendant Any Arrears Of Maintenance Charges Under The Said Consent Judgment

[11] Words are the vehicle for our thoughts. Communication has evolved from the use of pictorial and sign language to that of the written word. Every written language has its own storehouse of words to convey even delicately different nuances of meaning. The age-old principle of giving words its natural and ordinary meaning when interpreting a written text in trying to ascertain the intention of the parties, whether in a contract or a consent

judgment which in reality is a contract with the sanction of the court, still holds true. In *Malaysia Discounts Bhd & Ors v. Pesaka Astana (M) Sdn Bhd & Ors* [2008] 5 CLJ 130; [2008] 6 MLJ 839 at p. 854, Ramly J (now FCJ) stated as trite the following:

> [41] It is trite law that **a consent judgment is to be interpreted in the same way as a contract.** Thus, the usual principles of contractual construction apply in the instant case: the paramount consideration is to ascertain the intention of the parties to the consent judgment. **Such intention is objectively assessed by the court, in particular by reviewing the language employed in the consent judgment** ... (emphasis added)

[12] Likewise in *MBf Holdings Berhad & Anor v. Dato' Loy Teik Ngan & Anor (and 7 Other Appeals)* [2015] 1 AMCR 21 the Court of Appeal opined at pp. 32 to 33 as follows:

> [33] We accept that it is settled law that a consent order was by nature similar to a contract between the parties to the suit or binding in respect of matters adumbrated in such a consent order. The usual rules for construing a commercial contract would accordingly be relevant in the construction of the consent order. (*Malaysia Discounts Bhd v. Pesaka Astana (M) Sdn Bhd* [2008] 6 MLJ 839.)

[13] Lord Bingham of Cornhill summarised succinctly the approach as follows in *BCCI v. Ali* [2001] UKHL 8, [2001] 2 WLR 735:

> To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties relationship and all the relevant facts surrounding the transaction so far as known to the parties. **To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.** (emphasis added)

[14] Lord Hoffmann in propounding five principles of construction of documents in the case of *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98 at pp. 114 to 115, placed primacy on the written text without disregarding context and background in cases where they would be relevant:

> (i) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (ii) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected by way in which the language of the document would have been understood by a reasonable man.

A (iii) **The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action of rectification.** The law makes this distinction for reasons of practical policy and in this respect, legal interpretation differs from the way we interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this
B is not the occasion on which to explore them.

(iv) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the documents is what the parties using those words
C against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] 3 AER
D 352, [1997] 2 WLR 945.

(v) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one were to nevertheless conclude from
E the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly would not have had. (emphasis added)

[15] Applying the above principles to the interpretation of the consent judgment, one can conclude that the words employed in the consent judgment
F are clear and unambiguous. To begin with they are not difficult to understand. The relevant parts of the consent judgment read as follows in its original language:

Tindakan ini setelah dipanggil untuk bicara pada hari ini dengan kehadiran Encik Hazlan bin Abdul Hamid Peguamcara bagi Plaintif dan
G Encik Lee Seong Yang Penguamcara bagi Defendan

Maka adalah pada hari ini di hakimi secara persetujuan bahawa **dalam penyelesaian yang penuh bagi tuntutan Plaintif terhadap Defendan bagi bayaran Pengurusan sehingga tarikh ini Defendan bagi bayaran Pengurusan sehingga tarikh ini** Defendan dengan ini bersetuju untuk memindah milik lot-lot kepunyaan Defendan yang terletak di Kompleks
H Yik Foong ialah kesemua lot-lot di Tingkat Bawah, lot-lot FF 5, FF 6 & FF 22 di Tingkat Satu, lot-lot SF 4, SF 5, SF 6 dan SF 7 di Tingkat Dua, Kesemua lot-lot di Tingkat Tiga dan Roof Garden (RG)

Dan adalah diperintahkan bahawa Defendan dengan ini bersetuju untuk menandatangi segala dokumen pindahmilik yang berkaitan dengan lot-lot
I tersebut bersama-sama dengan Surat Kuasa Wakil yang akan berkuatkuasa sehingga Defendan digulungkan

Dan adalah diperintahkan bahawa *Defendan dengan ini bersetuju untuk membayar kepada pihak Plaintif bayaran Pengurusan yang dikenakan ke atas lot-lot yang kepunyaan Defendan daripada tarikh penghakiman pada kadar RM1.25 sekaki persegi bermula dari tarikh penghakiman persetujuan*

Dan akhirnya adalah diperintah bahawa dengan persetujui bahawa kedua-dua belah pihak menanggungjawab kos guaman masing-masing berkaitan dengan tindakan ini dan kos bagi pindahmilik lot-lot yang di nyatakan di atas ditanggung oleh pihak plaintif. (emphasis added)

[16] The consent judgment spells out clearly what the plaintiff here as defendant there is required to do. The plaintiff shall transfer the settlement lots to the defendant in full settlement of the defendant's claim for maintenance charges and further that the plaintiff is required to pay maintenance charges of RM1.25 psf on the lots owned by the plaintiff commencing from date of the consent judgment.

[17] It goes without saying that there is a value to the settlement lots and since the transfer by the plaintiff to the defendant is in full settlement of the defendant's claim, one may conclude that both the amount in arrears and the value of the settlement lots must be understood to be sufficient consideration to amount to a full settlement of the defendant's claim. Otherwise one would have expected the figure for the amount outstanding to be so stated and also the value of the settlement lots as might have been agreed by the parties. Both were conspicuously and if I may so, consciously left out as the consent judgment was drafted by the solicitors from both sides; not by laymen.

[18] Parties have also agreed to pay the maintenance charges at RM1.25 psf. No rationale was stated in the consent judgment and parties must have agreed to that term as part of the full settlement of the defendant's claim. The period for which the said payment is to be made was not stated in the consent judgment. One can safely presume that as the context is that of the owners of the shop lots paying maintenance charge to the management corporation under the Strata Titles Act 1985, then the payment must be for so long as the plaintiff is the owner of the shop lots and shall cease upon a sale of the shop lots to a third party, in this case to the garnishee in question.

[19] Such an understanding of the consent judgment by the plaintiff as given in evidence by its director PW1 Mr Leow Chin Pang is a reasonable interpretation as borne by the words employed in the consent judgment. There is no ambiguity and so there is no need for one to go beyond the consent judgment to documents exchanged between the parties or discussions had before the consent judgment was entered into.

[20] As was observed in *Interpretation of Contracts* by Catherine Mitchell, Routledge-Cavendish, 2007 at p. 33:

... since contractual interpretation is concerned with intent only to the extent that it can be objectively established, this tends to favour the

written contractual text as the thing to be interpreted. **It is the intentions revealed by the language which are important, not the subjective intentions of each contracting party.** (emphasis added)

[21] Lord Steyn explained with unrivalled clarity the above principle in *Deutsche Genossenschaftsbank v. Burnhope* [1995] 1 WLR 1580 at p 1587 as follows:

> It is true the objective of the construction of a contract is to give effect to the intent of the parties. But our law of construction is based on an objective theory. The methodology is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. **Intention is determined by reference to expressed rather than actual intention. The question therefore resolves itself in a search for the meaning of language in its contractual setting.** (emphasis added)

[22] Locally in *Michael C Solle v. United Malayan Banking Corp Bhd* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267; [1986] 1 MLJ 45, Hashim Yeop Sani FJ said at p. 46 as follows:

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said ...

[23] Where a reasonable man reading the terms of the consent judgment has no doubt as to its meaning, resort must not be had to even contemporaneous documents which if referred to, would yield a different meaning. This is consistent too with the exclusion of extrinsic evidence rule as codified under our ss. 91 and 92 of the Evidence Act 1950. The rule is that "where a contract has been reduced to writing, neither party can rely on extrinsic evidence of terms alleged to have been agreed, ie, on evidence on contained in the document". See GH Treitel, *The Law of Contract*, 11th Edn, 2003, London: Sweet and Maxwell, p. 192.

[24] The defendant in contending that its intention was that the transfer of the settlement lots was only in partial settlement of the sum claimed, and that there was a balance sum owing which was to be settled by the extra payment of RM0.25 psf for the remaining lots occupied by the plaintiff until the whole balance sum is paid in full, would require the introduction of the following words into the consent judgment:

(i) The amount claimed and the value of the settlement lots;

(ii) The balance outstanding after taking into consideration the value of the settlement lots;

(iii) The fact that there is an extra RM0.25 psf to be paid by the plaintiff for its remaining lots until the whole outstanding sum is paid in full;

(iv) That should the plaintiff ceases to be the owner of the remaining lots through sale to a third party, then the whole of the balance sum outstanding becomes immediately due and payable;

(v) That any third party who has bought over the remaining lots shall be liable to pay for the balance amount outstanding by way of an extra RM0.25 psf; and

(vi) That even if there is later an increase in the maintenance charge of RM1 psf as is the amount paid by the other owners, the plaintiff is still liable to pay at RM0.25 psf above what the other owners are paying until the whole outstanding is paid.

[25] One can appreciate the massive amendments that have to be made to the consent judgment to yield the meaning intended by the defendant. The fact that all these permutations and possibilities were not addressed, lends credence and weight to the argument that the payment of RM1.25 psf is for so long as the plaintiff is the owner of the unsold units.

[26] The consent judgment was agreed to by learned counsel for both sides and drafted and approved by them and both are deemed to have in mind the various contingencies and exigencies that might arise. It was not drafted by novice or laymen.

[27] The warning issued by the Privy Council in the case of *Attorney General of Belize and Others v. Belize Telecom Ltd and Another* [2009] 2 All ER 1127 has come home to roost:

> [16] ... The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. **It cannot introduce terms to make it fairer or more reasonable.** It is concerned only to discover what the instrument means. However, **that meaning is not necessarily or always what the authors or parties to the document would have intended.** It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 BCLC 493, [1998] 1 WLR 896, 912-913. **It is this objective meaning which is conventionally called the intention of the parties,** or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument. (emphasis added)

[28] Clearly "... it is not for the court to rewrite terms or to imply terms agreement which would be inconsistent with the spirit of the express terms" as was observed in *Roberto Building Material Pte Ltd and Ors v. Oversea Chinese Banking Corporation And Others* [2003] 3 SLR (R) 217. The Singapore Court of Appeal in *Pacific Century Regional Development Ltd v. Canadian Imperial Investment Pte Ltd* [2001] 2 SLR 443 said that the subjective intention of the parties is wholly irrelevant. As Lord Hoffman in the case of *Attorney General of Belize* (*supra*) further explained:

A [19] The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260, [1973] 1 WLR 601, 609, 9 BLR 60 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:

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> [T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. *If the express terms are perfectly clear*
C *and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable.* An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been
D adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves. (emphasis added)

E **[29]** Here there is no difficulty for a reasonable man in interpreting the terms of the consent judgment, to come to the conclusion that the amount claim has been settled by a transfer from the plaintiff to the defendant of the settlement lots and the payment thereafter by the plaintiff of maintenance charges at the rate of RM1.25 psf for the remaining lots still with the plaintiff.
F To subscribe to defendant's interpretation would be to stretch and strain the language of the consent judgment beyond breaking point and indeed would require the court to read words into the consent judgment not already there. The court will be rewriting the consent judgment for the parties and that must be resisted even if the additional terms have a reasonable basis.

G **[30]** It will be apposite for me to adopt the approach taken by Gibbs J (as he then was) in *Australian Broadcasting Commission v. Australasian Performing Rights Association Ltd* (1973) 129 CLR 99 at p. 109 as follows:

> It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the
H words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. *If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and*
I *notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust …* (emphasis added)

Whether The Defendant May Be Allowed To Refer To Extraneous And Contemporaneous Documents On The Negotiations And To Give Evidence On Its Actual Intention With Respect To The Consent Judgment

[31] The weightage given to the words employed in a document as compared to extraneous evidence that the parties may seek to introduce when interpreting a document has been jealously guarded by the courts as emphasised by His Lordship Abdul Malik Ishak JCA in *Asiapools (M) Sdn Bhd v. IJM Construction Sdn Bhd* [2010] 2 CLJ 28 at pp. 43 and 44:

> In construing a written contract, like the present case at hand, the professed object of the court is quite simple. It is to discover the mutual intention of the parties (*Pioneer Shipping Ltd And Others v. BTP Tioxide Ltd* (*supra*); and *International Fina Services AG v. Katrina Shipping Ltd and Tonen, Tanker Kabushiki Kaisha, (The 'Fina Samco')* [1995] 2 Lloyd's Rep 344, CA, at p 350). And the intention of the parties must be ascertained from the document itself. **Thus, the parties themselves cannot give direct evidence to show that their intentions were at variance with the provisions of the contract document** (*Prenn v. Simmonds* [1971] 1 WLR 1381, HL, at p 1385; *Hyundai Merchant Marine Co Ltd v. Gesuri Chartering Co Ltd, (The 'Peonia')* [1991] 1 Lloyd's Rep 100, CA, at p 102; *British Movietonews Ld v. London And District Cinemas Ld* [1952] AC 166, HL; and *Zoan v. Rouamba* [2000] 1 WLR 1509, CA, at p 1523). The task of the court is quite simple. **It is to construe the contractual term without any preconception as to what the parties intended** (*Pagnan SpA v. Tradax Ocean Transportation SA* [1987] 1 All ER 81, at p 88, which was affirmed on appeal *vide* [1987] 3 All ER 565).
>
> When the minds of the parties are expressed in an unambiguous manner, the principles of construction which are at best only a guide in the search for the intention of the parties cannot be relied upon to override the declared intention of the parties unequivocally expressed in the contract document (*K Appukuttan Panicker and Another v. SKRAKR Athappa Chettiar*, AIR 1966 Kerala 303). And *where the intention of the parties is clear from the language which they have used in the agreement, like the present case at hand, and the words contained therein are clear and unambiguous, there is no scope for drawing upon hypothetical considerations or supposed intentions of the parties* (*The Union of India v. Kishorilal Gupta and Bros*, AIR 1959 Supreme Court 1362). According to the case of *James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, HL, [1970] 1 All ER 796, HL, *once a contract has been considered it must be interpreted without reference to pre-contractual negotiations or subsequent dealing between the parties. The reason for this approach is easily discernible. It is purely to preserve the certainty given by written contracts*. (emphasis added)

[32] The Court of Appeal in *Pembinaan Perwira Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd* [2011] 1 LNS 1769; [2012] 4 MLJ 774 at 779 reiterated as follows:

> We entirely agree that courts must give effect to the plain meaning of words, where words are clear and unambiguous ...

[33] As was laid down by Lord Hoffmann in the *Investors Compensation Scheme Ltd* (*supra*) at p. 114:

> The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action of rectification.

[34] Where the document is clear, whether that document is a contract or an order of the court, there is no justification to refer to other terms and conditions that the parties might have discussed but which did not find its way into the document. The rule that one must interpret a document within its four corners still holds good and it is only when the document is not clear that one is permitted to look at the surrounding contemporaneous documents that might shed some light on what is confusing or even conflicting within the document. One must resist and desist referring to extraneous documents to justify a different interpretation to the clear text of a document.

[35] In the Federal Court case of *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231; [1984] 2 MLJ 268, it was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. His Lordship Seah FJ was firm in following the above principle at p. 270:

> With respect, we do not agree. In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of section 4(3) of the Civil Law Act 1956 **is to be gathered only from the four corners of the instrument itself**. (emphasis added)

[36] From reading the clear terms of the consent judgment one cannot arrived at an objective conclusion that there is still a sum of RM976,386.65 due to the defendant as a judgment creditor. The transfer of the settlement lots was to settle in full the amount that the defendant had claimed against the plaintiff and as a further consideration of the settlement, the plaintiff was to continue paying the maintenance charges at RM1.25 psf and unless otherwise stated, the payment would be following the Strata Titles Act 1985 for as long as the plaintiff was still the units owner.

[37] It does not matter that by reference to extraneous or even contemporaneous documents exchanged by the parties before the consent judgment was entered, one may be able to discern a different intention. If that be allowed then there will be no certainty in written terms of a contract or a consent judgment. If indeed the consent judgment was not clearly expressing the intention of the parties, then the defendant should proceed timeously with an application for rectification of the consent judgment. It appears that the circumstances under which a consent judgment may be

rectified are similar to that of the rectification of a settlement or a document. As was observed by Brightman J in *Re Butlin's Settlement Trust* [1976] Ch 251 at pp. 260 to 261:

> Furthermore, rectification is available not only in a case **where particular words have been added, omitted or wrongly written as the result of careless copying or the like.** It is also available where the words of the document were purposely used but it was **mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction.** In such a case, which is the present case, the court will rectify the wording of the document so that it expresses the true intention:
>
> > see *Jervis v. Howle and Talke Colliery Co Ltd* [1937] Ch 67; *Whiteside v. Whiteside* [1950] Ch 65, 74 and *Joscelyne v. Nissen* [1970] 2 QB 86, 98. (emphasis added)

[38] In the Federal Court case of *Tio Chee Hing v. Tractors Malaysia Bhd* [1972] 1 LNS 157; [1973] 1 MLJ 66 His Lordship Gill FJ observed as follows with respect to rectification of a judgment at p. 67:

> The present action by the appellant was commenced on May 16, 1972. The order appealed from was made on July 6, 1972. Before coming to the grounds on which the writ and all subsequent proceedings in the present action were set aside, I must refer to the observation which the learned judge has made regarding the application in the earlier suit itself to have the consent judgment set aside. That observation is to the effect that the appellant never appealed against the dismissal of that application as there was no ground on which he could justifiably succeed. With that observation of the learned judge I agree, but only to the extent that the appeal would have failed solely on the ground that *after a judgment has been passed and entered, even though it may have been taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose, unless there has been a clerical mistake or an error arising from an accidental slip or omission in the judgment, or the judgment as drawn up does not correctly state what the court actually decided and intended to decide,* in either of which cases an application under Order 28, rule 11 of the Rules of the Supreme Court, 1957 **for the rectification of the judgment can be made in the same action.** (See *Ainsworth v. Wilding* [1896] 1 Ch 673). (emphasis added)

[39] In *Ainsworth v. Wilding* [1896] 1 Ch 673, Romer J summarised the circumstances under which a judgment may be rectified at p. 677 as follows:

> ... So far as I am aware, the only cases in which the Court can interfere after the passing and entering of the judgment are these: (1) Where there has been an accidental slip in the judgment as drawn up - in which case the Court has power to rectify it under Order XXVIII, r. 11; (2) when the Court itself finds that the judgment as drawn up does not correctly state what the Court actually decided and intended. I am not now speaking of cases where the Court acts by the consent of the parties; I think that with consent of the parties I should have had jurisdiction, but on the authorities that is not free from doubt; and I am not speaking now of

A merely interlocutory orders, even if drawn up, as to which different considerations probably apply, as was pointed out by the late Master of the Rolls in *Mullins v. Howell*. (1) This being so, does the applicant bring his case under either of the two heads of exceptions to the rule that after the judgment has been passed and entered the Court has no power to alter it? In my judgment, the case is not within either exception. In the
B first place, I do not think that it would be putting a fair interpretation on Order XXVIII, r. 11, to say that the case was within that rule. It is not the case of a clerical mistake, or an error arising from an accidental slip or omission. I say that, although it is quite true that the rule would apply in a proper case where there had been a mistake of fact, on which the judgment was obviously founded. In this case I cannot, without going
C into evidence and really trying the matter out, decide at once that there has been an accidental slip or omission, and it is clear that this case is not within the rule. And certainly the case is not within the second exception. **The judgment, as drawn up, simply expressed what the parties consented to, and contains the very words consented to, and it certainly carries out what the Court decided and intended to decide.** (emphasis added)
D

[40] I would echo the same observation highlighted above with respect to the present case. There is nothing convoluted about the consent judgment but only the clear words of "... dalam penyelesaian yang penuh bagi tuntutan ..." which being translated mean "... in full settlement of the claim ..."

E **[41]** Learned counsel for the defendant, Mr Kerpal Singh, contended that there was no need to because the plaintiff was paying at the rate of RM1.25 psf every month without protest. However, the contemporaneous documents do not support that contention. On 15 September 2010, after the consent judgment was recorded on 3 September 2010, Messrs Mohd Noor & SY Lee
F representing the plaintiff here had written to Messrs Iszam Kamal & Hazlan representing the defendant here, complaining as follows:

With reference to the above case and the recent recording of the consent judgment, our client has instructed us to write to you as follows. The settlement was proceeded with on a matter of goodwill on the part of all
G parties concerned. It was agreed that our client would pay the maintenance charges of RM1.25 per square foot as part of the settlement but in the event of a sale, the new buyer would revert to the normal rate charged to the owners of the other lot, which is RM1.00 per square foot. Our client has agreed to transfer some of the lots to your client. ... We are now informed that your client has been sending out notices to the
H tenants of our client, who are potential purchasers of the lots, that your client will charge maintenance charges at RM1.25 per square foot as "additional maintenance contribution or charges". We enclose herewith a copy of the Notice sent by your client to one of the tenants/potential buyers. This goes against the spirit and intent of the settlement and will not lead to goodwill. This will also promote bad feelings affect (sic) the
I sale and running of the complex.

... If this line of action is continued, our client will have no hesitation to institute legal proceedings against your client.

[42] It would not be unfair to say that the defendant was trying to recoup its so-called balance judgment sum not paid by the plaintiff from the new purchasers of the units that may be sold by the plaintiff in a novel attempt at imposing privity when there was none. Unless contractually agreed otherwise, all unit owners would be paying based on the rate as may be determined by the unit owners at the AGM of the management corporation.

[43] Based on the consent judgment as drafted, the plaintiff cannot be faulted for having understood that the transfer of the 53 lots is in full and final settlement of the claim for maintenance charges. At p. 234 of the bundle D in the letter dated 1 September 2010 from Messrs Mohd Noor & SY Lee representing the plaintiff to Messrs Iszam Kamal & Hazlan representing the defendant here, just before the consent judgment was recorded on 3 September 2010, it is stated as follows:

> Strictly without prejudice, our client offers to settle your client's claim inclusive of costs by transferring to your client all of our client's lots in the Lower Ground, 1st Floor, 3rd Floor and Roof Garden in full and final satisfaction of your client's claim inclusive of costs and up to date of settlement. According to our client's Valuer the value of the lots in the Lower Ground, 1st Floor, 3rd Floor and Roof Garden is RM5,982,270.00 ... (emphasis added)

[44] One would have expected that if the parties could not agree still on the market value of the settlement lots, then the value would have been stated in the consent judgment recorded two days later unless it is a case where by then the parties are already *ad idem* that with the transfer of the settlement lots there was no need to state the value as it was understood to be in full and final satisfaction of the defendant's claim until the date of the settlement.

[45] PW1 Leow Chin Pang, who is the managing director of the plaintiff, testified that that was his understanding of the agreement arrived at by the parties. In the consent judgment there was clearly and conspicuously absent the price or value of the 53 settlement lots agreed to be transferred by the plaintiff to the defendant. At question 10 of his witness statement marked as WSP1 he answered as follows:

> Q10 Was a price or value placed on the 53 lots?
>
> A. No. The Defendant only asked for the 53 lots to be transferred to them. We did not agree on any price or agree to any value of the 53 lots even though we said that the 53 lots earlier suggested were worth RM5,982,270.00. Please see our letter dated 01/09/2010 in page 234 the Ikatan Tambahan Lanjutan Dokumen.

[46] At the trial, PW2 Mr Lai Mun Wan, a qualified registered valuer, who gave evidence as an expert, testified that the 53 settlement lots were valued at RM6,432,720 at 2001 and that in 2011 they would definitely be worth more. The said valuation report by Rahim & Lai Sdn Bhd was dated 5 February 2002. PW2's credentials have not been seriously challenged. He is now 72 years old and a member of the Royal Institute of Surveyor,

Malaysia and qualified as a member of the Royal Institute of Surveyors, United Kingdom in 1969. He was in the government valuation department and was the State Director of the Perak Valuation Department between 1976 and 1979 until he went into private practice and became a director of Rahim & Lai Sdn Bhd.

[47] The defendant had not called any expert registered valuer to support its contention that the 53 settlement lots had a value then of RM4,069,000.

[48] PW1 further explained what he understood the imposition of RM1.25 psf to mean as follows in his answer to question 14 in WSP1:

> They also asked for management fees at RM1.25 per square foot in respect of the remaining lots owned by Plaintiff. The normal rate was RM1.00 per square foot for the other owners. I did not know why they asked for the extra 0.25 sen but as this was asked for and Plaintiff wanted to settle the case. I agreed.

[49] That is a reasonable explanation though the words of the consent judgment are clear and to make the consent judgment yield the interpretation put by the defendant would involve a massive addition of words not in the document including very materially the price of the settlement lots as may be agreed by the parties, the amount offsetted by the transfer of the settlement lots and the balance judgment sum to be paid by the additional RM0.25 psf per month until the balance judgment sum is paid in full and even the very uncommon term that if a new purchaser were to purchase the units of the plaintiff, then the new purchaser would have to pay at the same rate of RM1.25 psf and one wonders until when that rate will continue to apply.

[50] The situation gets more ludicrous when one considers the case where in the future the management corporation may decide at the AGM to charge for example RM1.50 psf for every unit owner. That is a reasonable question to ask for DW1, Mr Chen Tin Gan, the general secretary of the defendant, said that it would take the plaintiff some 30 over years to pay the balance of RM1,080,719.97.

[51] Would then the plaintiff or the subsequent purchasers from the plaintiff be required to pay RM0.25 more than RM1.50 ie, at RM1.75? When asked the question by Mr Kerpal Singh for the defendant, DW2 Encik Hazlan bin Abd Hamid, the solicitor for the defendant, explained that the plaintiff would still pay at the rate stated in the consent judgment at RM1.25 psf. Such too was the understanding of PW1 under cross-examination.

[52] If I may say here that such an interpretation would further underscore the stand taken by the plaintiff that RM1.25 is paid for as long as the plaintiff is the owner of the units for otherwise the rationale of charging RM0.25 more than whatever is the current rate would no longer be relevant! The plaintiff would then be paying less than the normal rate and it would be nigh impossible to pay whatever may be the arrears with this method of paying the balance judgment sum!

[53] The situation becomes more absurd when DW1 testified that the plaintiff had been paying at RM1.20 psf even before the recording of the consent judgment. That is borne out by the documents at pp. 1 to 3 of bundle E being a set of calculations done by the defendant. If that be the case then the extra would only be a mere RM0.05 psf and that would stretch the period of repayment of the balance judgment sum to 150 years! If as DW1 had testified that the defendant had been gracious and generous to the plaintiff, then that would really be stretching its graciousness and generosity to a level quite unheard of.

[54] The learned author Kim Lewison in *The Interpretation of Contracts*, London: Sweet & Maxwell 1989 at pp. 3 to 4 observed as follows:

> ... the court is concerned to ascertain, not what is the intention of the actual parties to a contract, but what would have been the intention of hypothetical reasonable parties, placed in the same position as the actual parties, and contracting in the words used by the actual parties. Thus in *Reardon-Smith Line Ltd v. Hansen-Tangen*, [1976] 1 WLR 989, Lord Wilberforce said:
>
> > When one speaks of the intention of the parties to the contract one speaks objectively - *the parties cannot themselves give direct evidence of what their intention was and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.*
>
> A similar point was made by Lord Reid in *McCutcheon v. David MacBrayne Ltd* [1964] 1 WLR 125 , approving the following quotation from Gloag on Contract (2nd Ed, 1985) at p. 7:
>
> > The judicial task is not to discover the actual intention of each party, it is to decide what each was reasonably entitled to conclude from the attitude of the other.
>
> It is therefore more accurate to say that the object of a court of construction is to ascertain the presumed intention of the parties, on the assumption that both parties are reasonable. In *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* [1982] 149 CLR 337. Mason J. said:
>
> > ... when the issue is which of two or more possible meanings is to be given to a contractual provision we look not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but would also be unrewarding as **it would tend to give too much weight to these factors at the expense of the actual language of the contract.**

Sir John Donalson MR gave a rather more cynical explanation of the unimportance of the actual intentions of the parties in *Summit Investment Inc v. British Steel Corpn* [1987] 1 Lloyds' Rep 230 at 233

> … their actual intention are happily irrelevant, since, were it otherwise, many, and perhaps most, disputes upon points of construction would be resolved by holding that the parties were not *ad idem*. (emphasis added)

[55] It was thus not helpful for DW2 as the solicitors for the defendant to say that the plaintiff understood that the extra RM0.25 psf was agreed to be for the purpose of paying the balance judgment sum and to be so paid even if the period is for some 30 years until it is paid in full.

[56] So too was the evidence of DW1 that on the morning of 3 September 2010 before the consent judgment was recorded, he handed over to Mr SY Lee, learned counsel for the plaintiff here his statement for proposed settlement at pp. 5 to 8 of bundle E. In his own words it is a statement for proposed settlement. That statement has now been summarised in another statement of the calculation as to how the current sum of RM 976,385.63 is due and owing to the defendant as found at p. 9 of bundle E and is reproduced below:

KOMPLEKS YIK FOONG MANAGEMENT CORPORATION
GFA1 KOMPLEKS YIK FOONG
JALAN LAXAMANA 30300 IPOH, PERAK

Management Fees from 1/1/2001 to 1/8/2010		RM6,342,186.87
Less 50% allowed on		RM1,192,466.90
Total amount owing by Hean-Sang Sdn Bhd up to date of Consent Judgement		RM5,149,719.97
Total Lots used to contra part payment of the total amount owing 53 Strata Titles		-RM4,069,000.00
Balance of sum still owing the Management Corporation		RM1,080,719.97
Payments made 1/9/2010 to 31/3/2014 22 lots @ RM0.25 per sq feet		
First Floor (2 lots) 753.2 x RM 0.25	RM8,096.90	
Second Floor (20 lots) 8952.32 x RM0.25	RM96,237.44	
Paid up to 31/3/2014		RM104,334.34
Balance due and owing		RM976,385.63

[57] The question is why wasn't the sum of RM4,069,000 stated in the consent judgment for the defendant already had the calculation with him? Likewise why wasn't the balance judgment sum of RM1,080,719.97 incorporated into the consent judgment? As is commonly understood, a consent judgment is the culmination and consummation of the dispute in a litigation and would be that final document crystallizing the agreed terms of the parties in the litigation. It surely cannot be that the defendant was reticent or reserved in stating the amount settled and the balance still remaining if there was one.

[58] The learned Judicial Commissioner in setting aside the garnishee order to show cause in Civil Suit MT4-22-253-2001 had also applied the same approach in placing no reliance on the intention as expressed by the defendant but in merely undertaking an objective exercise in ascertaining the clear words of the consent judgment as explained below in *Kompleks Yik Foong Management Corporation v. Hean-Sang Sdn Bhd; Myth Empire Properties Sdn Bhd* [2014] 1 LNS 1575:

> [16] JC's *ex parte* application for the garnishee to show cause was supported by an affidavit (Encl. 85) sworn by Chen Tin Gan (CTG). CTG tried to justify JC's claim for the amount stated in the application, that is RM976,386.65. CTG exhibited the Civil Suit No. 22-253-2001 (CTG-1) and also a calculation done by JC which was used in the negotiation during the settlement of the civil suit (CTG-3). Based on those averment, JC's counsel summarized the claim in his submission as stated in paragraph [7] above. It is trite that in the interpretation of a document, the court is not bound by any evidence adduced by the witness. Abdul Kadir Sulaiman JCA, (as he then was) in the case of *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259, said that:
>
> > The construction of a contract is a question of law to be determined by this court. This court is not bound by the admission of witnesses or the concession made by counsel in the court below.
> >
> > In *NVJ Menon v. The Great Eastern Life Assurance company Ltd* [2004] 3 CLJ 96 at 103 and 104 this court had held as follows:
> >
> > > It would be noticed that we have in arriving at our aforesaid conclusion made no reference to the oral evidence led at the trial as to the meaning and interpretation of the contract between the parties. This is because the construction of contract is a question of law for determination by the court and not by witnesses through their oral evidence.
>
> As Lord Diplock observed in *Bahamas International Trust Co Ltd v. Threadgold* [1974] 1 WLR 1 514:
>
> > In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the

A concession is made; a fortiori in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting
B contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.

Therefore, the court has to interpret the said Consent Judgement as it is without referring to any other evidence and have to confine the
C interpretation within the four corners of the judgement only.

[59] To make the consent judgment read the terms not recorded which has the effect of contradicting the meaning of "penyelesaian yang penuh" or "full settlement" would be unfair to the plaintiff. It would offend the clear words of the consent judgment.

D

[60] The wisdom of Lord Wilberforce as distilled below in *Prenn v. Simmonds* [1971] 1 WLR 1381 at p. 1384 bears repetition. In maintaining that the main reason for the exclusion of prior negotiations was that such evidence is unhelpful, His Lordship explained as follows:

E ... By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final judgment, though converging, still divergent. **It is only the final document which records a consensus.** (emphasis added)

[61] As late as the morning of 3 September 2010 DW2 stated that there was
F a letter from Messrs Iszam Kamal & Hazlan to Messrs Mohd Noor & SY Lee marked as exh. D1 which read as follows:

Kindly be informed that our client is unable to accept the whole of your client's counter-proposal and as such we append herewith on without prejudice basis of our client's counter-proposal as follows:

G (a) Our client is agreeable to accept all the LG Floors, 1st Floor (FF 22), 3rd Floors and the RG.

(b) In case for the rest of the 1st Floor (FF 5, FF 13 & FF 14) which belongs to your client TO BE REPLACED with the Lots situated at 2nd Floor at SF 4, SF 5, SF 6, SF 7, SF 18 & SF 19;

H (c) The balance of RM1,080,719.97 being the arrears of the Management Fees after decision the value of the above Lots, is to be paid by way of monthly instalment until full and final settlement.

[62] DW2 states that he had personally handed over the said letter to Mr SY Lee on the morning of the date the consent judgment was recorded
I but he admitted that there was no acknowledgment on the said letter by Mr SY Lee. At any rate, it cannot be said that that letter represented the final terms agreed as it was a counter-proposal by the defendant and at any rate, the units in SF 18 and SF 19 were not included in the consent judgment.

[63] One would have expected that if the value of the settlement lots had been agreed by the time the consent judgment was recorded and the balance of RM1,080,719.97 ascertained, both figures would have found their way into the final document in the consent judgment. The fact that they did not would lend credence to the understanding that all that the parties had agreed was the transfer of the settlement lots in full satisfaction of the amount claimed up to the date of settlement and a further term that the plaintiff should continue to pay maintenance charges of RM1.25 psf until they cease to be owners of the remainder units.

[64] This is not a case falling under the exceptions where resort to extraneous documents evidencing negotiations would be helpful in deciding what was the term of an oral contract, or in the case of a rectification of the written document or if one party is trying to establish additional obligations by way of a collateral running alongside the main contract as in the Federal Court case of *Tan Swee Hoe Co Ltd v. Ali Hussain Bros* [1979] 1 LNS 113; [1980] 2 MLJ 16.

[65] I would thereby eschew any need to refer to extraneous and even contemporaneous documents to shed some light on the final document in the consent judgment to make it bear a different meaning cast on it by the defendant when the plain words in it cannot support and are not susceptible to that meaning.

Whether The Defendant Is Barred By Res Judicata In Contending That There Is A Debt Due To Them Under The Consent Judgment When Another High Court Had Set Aside The Garnishee Order To Show Cause And The Court Of Appeal Had Dismissed The Defendant's Appeal

[66] After the defendant here had filed its *ex-parte* application in the 2001 suit on 16 April 2014 for a garnishee order to show cause which was granted on 17 April 2014, the plaintiff filed this writ action on 26 May 2014 to seek a declaration that under the consent judgment as recorded there is no judgment sum due and owing to the defendant as judgment creditor from the plaintiff as the judgment debtor.

[67] The plaintiff also filed an application in the 2001 suit to set aside the garnishee order to show cause. Before this writ action could be heard, the court in the 2001 suit had heard the application of the plaintiff to set aside the garnishee order to show cause and had agreed with the plaintiff and had set aside the garnishee order to show cause. The reasons given are as stated below by the learned Judicial Commissioner:

> [17] As regards to the rights and obligations of the parties, second paragraph [of the Consent Judgment] further described the duty of the JD. JD had to transfer the 53 units of the shop-lots to JC as a full settlement and to sign all relevant documents as stated in the third

A paragraph. In fourth paragraph, JD agreed to pay RM1.25 per sq. foot management fee for the remaining 20 shop-lots. Those were all the salient terms agreed upon.

[18] By the ordinary meaning of the terms agreed, I have to agree with JD's counsel contention. *The said Consent Judgment does not provide any* B *monetary payment. Not a single cent was mentioned in the judgment. I must say that if JD [had] been required to pay any outstanding amount of the management fee it should have been clearly stated in the said Consent Judgment.* As it is, the entire burden of JD to perform under the said Consent Judgment is squarely within the ambit of the paragraphs 2,3 and 4. I am of the view that the last ditch attempt by JC to introduce the fresh terms is an C afterthought that would undermine the said Consent Judgment which is valid and binding (sic) the parties. (emphasis added)

[68] The issue to be decided in this writ action is the same as that in the 2001 suit in the setting aside of the garnishee order to show cause. It boils down to this: Is there a debt of RM976,386.65 due and owing from the D garnishee to the JD for which the JD owes the JC? The fact that there is the balance purchase price due and owing from the garnishee/purchaser to the JD/vendor is not seriously disputed. What the JD is disputing is that there is no amount outstanding in favour of the JC from the JD under the consent judgment. That is the same issue that this court in this writ action filed by E the plaintiff as JD there in the 2001 suit has to decide, that is whether under the terms of the consent judgment there is the sum of RM976,386.65 or any other sums owing by the plaintiff to the defendant as at 30 April 2014.

[69] As stated, the defendant as JC there had appealed against the said decision to the Court of Appeal and the Court of Appeal had on 24 November F 2014 dismissed its appeal.

[70] This is a fit and proper case for the application of the doctrine of *res judicata*. Learned counsel Mr SY Lee for the plaintiff/JD referred the court's attention to the case of *CMC Perniagaan Sdn Bhd v. Shimizu Construction Co Ltd* in Civil Suit D4-23-300-88 in High Court, Kuala Lumpur which G summary of facts and decision of the court appeared in *Mallal's Digest Yearbook 1991* as follows:

The P and D were involved in a construction project of which D was the main contractor. Pursuant to a written agreement, D agreed to pay P directly for the supply of cement to X Sdn Bhd, D's supplier of ready- H mixed concrete. Subsequently D was unable to pay any further sums to P because D was served with a garnishment nisi from Z Sdn Bhd wherein X Sdn Bhd was the judgment debtor. P had intervened in the garnishment suit wherein P laid claim to a sum of money which P contended was due from D to them. In the garnishment proceedings, D disputed liability to pay the sum of money to X Sdn Bhd and maintained I that the money was to be paid by P. P's claim was dismissed by the senior assistant registrar who heard the garnishment suit. P's appeal was also

dismissed by the High Court. In the present action, P sued D for the sum in question. P applied for an ord 14 judgment to be entered against D. The registrar granted D conditional leave to defend the action. In the appeal to the High Court, D contended that since P's claim to the money's in the garnishment suit had already been dismissed on appeal, P was precluded from having the same matter heard before another court. D also contended that in view of the dismissal of P's claim to the money's in the garnishment suit, D could not be said to owe P the sum in question.

Held, allowing D's appeal:

(1) in order that a Defence of *res judicata* may succeed, it is necessary to show that the cause of action was the same. In the instant case, P's claim in the garnishment suit was based on the same factual situation relied upon by them in the present suit, namely, to recover payment for the supply of cement. In the garnishment proceeding, the issue was decided by the learned judge on the merits and this was a judicial determination of the issue which was final. In the circumstances, the doctrine of *res judicata* applies to the present case;

(2) in any event, P was estopped from bringing the present action against D. The issue in the present case was the same as the issue which was judicially determined in the garnishment suit. The decision in that suit was final and both P and D were parties to the proceedings;

(3) as the defence set up by the D was not a sham, the court considered it a proper case to allow D unconditional leave to defend the action. D's appeal was, accordingly, allowed by the court.

[71] I am in agreement with the principle enunciated above. Where the issue is the same premised on the same factual matrix that an earlier court has to ascertain and determine, and where as here, there was even an appeal to the Court of Appeal, another court would be barred by the doctrine of *res judicata* and in this case, issue estoppel, from reopening the same issue and re-litigating the same issue again.

[72] The rationale for the doctrine of *res judicata* had been spelt out in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74 at p 76 by His Lordship Sharma J. as follows:

In *Satyadhyan Ghosel and others v. Sint Deorajin Dobi and another* AIR 1960 SC 941, the statement of the law on the subject is given thus:

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res judicata* is, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. *When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.* This principle of *res judicata* is

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> embodied in relation to suits in section 11 of the Code of Civil Procedure; but even where section 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

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> The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. (emphasis added)

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[73] The above passage was endorsed by the Court of Appeal in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 AMR 1457 at p. 1468 as follows:

> A failure to adhere to the principle expressed in the judgment of Sharma J just quoted may lead to chaos in the conduct of civil proceedings. The facts of this very case afford a good illustration of such a consequence. We have here an earlier decision by the Judge upon a procedural issue determining it in the appellants' favour. Then along comes the respondent at the adjourned hearing and applies to the Judge to re-open the issue and review his earlier decision. The Judge obliged and reversed himself. What was there to prevent the appellants from then (sic) an application to the Judge to re-review his decision reversing himself? On the assumption of the law made by counsel before us there would have been no bar to the Judge undertaking such an exercise. The process could then be repeated *ad infinitum* with no conclusion. It would be a circular tail chasing exercise with no forward movement, proving to the man on the street that the maxim "the law is an ass" is not without content. The absurd results that would ensue in accepting the contention of counsel demonstrates the inaccuracy of the proposition advanced.
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> We cannot over emphasise the proposition that once a Judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be re-opened willy-nilly. One may then ask: how is this approach to be reconciled with the decision in *Harrison*? The answer to that question lies in recognising that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

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[74] It cannot be denied that in both the garnishment proceeding in the 2001 suit and the declaration sought in this action, there is only a single issue to be decided: whether there is any sum due and owing by the plaintiff/JD to the defendant/JC? That determination straddles the same substratum of

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facts in both the garnishment proceeding and this writ action. The result has to be the same and more so when the earlier decision in the garnishment proceeding has been affirmed on appeal by the Court of Appeal.

[75] Learned counsel Mr Kerpal Singh for the defendant made a gallant attempt to trying to persuade that *res judicata* does not apply as the learned Judicial Commissioner in the garnishment proceeding did not address his mind to the fact that there were monthly statements given to the plaintiff by the defendant appearing at pp. 130 to 171 of bundle B which reads as follows:

> The additional RM0.25 per sq.ft. Is to be paid according to the terms of settlement of the remaining lots owned by Hean Sang Sdn Bhd until full & final settlement of the total sum still owed to the management.

[76] Like all judgments of the court, it is not necessary that each and every submission of the learned counsel must be addressed in the judgment. The learned Judicial Commissioner must be taken to have considered all the arguments advanced by learned counsel and to have arrived at the conclusion that there was no judgment sum still due and owing under the consent judgment and that conclusion was arrived at by interpreting the clear words of the consent judgment.

[77] Indeed he alluded to that in passing as follows:

> [19] Even though JD's and garnishee's counsel did raise other technical issues, I am of the view that the reason discussed above can solely decide on the JD's application.

[78] Even assuming that there was a fresh contract that had emerged after the consent judgment was entered into with the issuance of the additional monthly statements, it is still not clear what "the total sum still owed to the management" is as it was also not set out in the monthly statements. It is not inconsistent with the plaintiff's understanding that they need to pay at this agreed rate for so long as they were the owners of the remaining lots.

[79] Learned counsel at para. 27 submitted that the learned Judicial Commissioner's interpretation does not probe into why the JD agreed to pay management fees at RM1.25 when the normal rate for all parcel owners was RM1. He argued with no less than the audacity of hope as follows at para. 28 of his submission:

> 28. Ultimately, the issue is whether the order for payment of the extra 0.25 sen related to the payment towards arrears of the management fees, and whether it was addressed and finally disposed of. I submit it was not. Therefore, there is no issue estoppel (and no *res judicata*).
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> 29. Predictably, the Court of Appeal will need to remit the case back for oral evidence to be called so that finality can be attained.

[80] Surely learned counsel Mr Kerpal Singh must have canvassed this point on appeal to the Court of Appeal with persuasive precision, but alas the Court of Appeal had a day before this judgment was delivered, dismissed his client's appeal.

Pronouncement

[81] In the overall circumstance of this case and for the reasons given above, I had allowed the plaintiff's claim for a declaration that it does not owe defendant the sum of RM976,386.65 or at all as at 30 April 2014 and thereafter. I had also allowed interest on the said sum of RM976,386.65 with effect from 26 May 2014 being the date of the statement of claim up to the date of receipt by the plaintiff of this sum at the rate of 3% per annum for that was what the plaintiff had been deprived when the said sum was kept with the garnishee's solicitors pending the resolution of this dispute in the garnishment proceeding and in this action.

[82] I further ordered cost of RM25,000 to be paid by the defendant to the plaintiff.